

IN THE SUPREME COURT OF THE STATE OF MONTANA
DA 10-0132

ROBERT JAMES COOK,

Petitioner and Appellant,

v.

DIANA McCLAMMY,

Respondent and Appellee.

FILED

AUG 10 2010

ORDER

Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Appellant, Robert J. Cook, appearing as a self-represented litigant, appeals from the District Court's refusal to make the Child Support Enforcement Division (CSED) a party to this proceeding. For the reasons set forth below, we dismiss this appeal without prejudice and remand this matter to the District Court with directions that CSED appear in the instant action and file a response on the merits to Cook's petition for an order directing CSED to refund to him funds it previously collected.

It is unnecessary here to recite the factual and legal background of this case, as the Court and the parties are well aware of it. We have reviewed the briefs of the parties herein, as well as the transcript of the District Court proceedings of September 18, 2009, CSED's responses to Cook's motions, CSED's motion to quash summons and dismiss petitioner's motion, and the District Court order of February 24, 2010, in which the court concluded that CSED was not a proper party to this action, and that the issues raised by Cook were already addressed and resolved in *Cook v. State*, 2009 MT 237N (*Cook I*).

We appreciate CSED's procedural argument that jurisdiction over it is inappropriate in the present action. However, CSED did appear in the instant case and did, albeit upon court order, brief the merits of Cook's petition. In *Wamsley v. Nodak Mut. Ins. Co.*, 2008 MT 56, 341 Mont. 467, 178 P.3d 102, this Court held that a party may come into court to contest personal jurisdiction without subjecting itself to the jurisdiction of the court, but if it seeks affirmative relief aside from its contest of personal

jurisdiction, then it has made a voluntary appearance in court and subjected itself to jurisdiction. *Wamsley*, ¶ 27. Here, CSED made the appropriate jurisdictional arguments, but then proceeded to argue that Cook's complaint failed to state a claim upon which relief could be granted pursuant to M. R. Civ. P. 12(b), and also briefed the merits of Cook's motions seeking repayment. Thus, under *Wamsley* and M. R. Civ. P. 4B(2), it arguably subjected itself to the personal jurisdiction of the District Court.

We have determined that it is appropriate to remand this matter to the District Court because inevitably, Cook will persist in seeking his day in court on the issue of the refund of the money he claims was wrongfully seized from him by CSED. This being so, it is preferable to have the matter aired, and fully and finally determined in a court proceeding in which Cook, McClammy *and* CSED are all present and represented by counsel to the extent of their wishes. In this regard, we disagree with the District Court's conclusion that res judicata bars this action, as our memorandum decision in *Cook I* did not address the question of whether CSED should be obligated to reimburse money to Cook, and the decision otherwise contained no legal analysis.

Accordingly, in the interests of judicial economy, we deem it appropriate to dismiss Cook's appeal without prejudice and remand this matter to the District Court with instructions that it assert jurisdiction over CSED and have it appear and file a response to Cook's motion seeking reimbursement for monies he claims were wrongfully seized from him, and thereafter resolve on the merits the issue of whether and from whom, if appropriate, Cook is entitled to reimbursement of seized funds. Therefore,

IT IS HEREBY ORDERED that this matter is REMANDED to the District Court for further proceedings consistent with this Order.

IT IS FURTHER ORDERED that Cook's appeal is hereby DISMISSED WITHOUT PREJUDICE.

The Clerk is directed to serve a copy of this Order upon all counsel of record, upon Cook at his last known address, and upon the Honorable Thomas M. McKittrick, Montana Eighth Judicial District Court, under Cause No. ADR-03-380.

Dated this 10th day of August, 2010.

Patricia Cottes

Michael W. Hart

Brian M. Munn

Jim Rice

W. William Dugan

Justices